United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

319

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD W. GREENWELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appelle.

No. 22563

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Harold W. Greenwell, the above-named Defendant Appellant presents this, his petition for a rehearing in the above-entitled case and in support thereof, respectfully shows:

1. The Court, in its opinion of affirmance, has failed to apply the rule previously laid down by this Court in the cases of Luck v. U.S., 121 U.S. App. D.C. 151, 348 F. 2d 763 and Gordon v. U.S., 127 U.S. App. D.C. 343, 383 F. 2d 936.

2. Conceding as this Court found in its opinion that Government witnesses in the Court below may have "quite positively" identified the Defendant Appellant, nonetheless, the introduction of the previous conviction of the Defendant Appellant of robbery of this identical bank extremely prejudiced the Defendant Appellant, and such prejudice created by such conviction far outweighed the probative relevance of this conviction.

3. It would appear that the interests of justice might have been better served in this case by the refusal of the Court below to permit the introduction of the previous conviction in that Court. It is entirely possible that, had such conviction not have been introduced, the jury may have taken a different view of the alibi evidence of the Appellant Defendant. Speculation as to what the jury would have done without the introduction of the conviction would appear not to be permitted.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

Thomas X. Dunn

Thomas X. Dunn
Attorney for Petitioner
Defendant Appellant
1200 15th Street, N. W.
Washington, D. C. 20005

(Court appointed)

CERTIFICATE FOR COUNSEL

I, Thomas X. Dunn, attorney for Defendant Appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

Thomas X. Dunn

Thomas X. Dunn

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 1969, I served a copy of the foregoing Petition for Rehearing on the United States Attorney for the District of Columbia by leaving a copy of same at his office at the United States Court House for this District.

Thomas X. Dunn

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 22563

HAROLD W. GREENWELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Thomas X. Dunn
1200 - 15th Street, N. W.
Washington, D. C. 20005
Counsel for Appellant
(Appointed by this Court)

March 19, 1969

QUESTIONS PRESENTED

1. Did the court below properly apply the Luck rule when he permitted the prosecution to introduce evidence of a conviction of the identical crime for which appellant was then on trial?

2. Did the court err by his decision to permit evidence of such conviction because counsel for appellant did not request the application of the Luck rule until after the appellant had testified on direct examination but during the course of cross examination?

3. Was it duty of the court below to advise the appellant that he was entitled to have counsel present at psychiatric examinations both before and after trial?

4. Would it be appropriate in order to serve the ends of justice to remand the case with instructions to the court below to order another psychiatric examination at which his counsel might attend?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction by the United States District Court for the District of Columbia entered on September 9, 1968.*/ Appellant was found guilty on each count of a seven-count indictment charging violation of Title 18 U.S.C., Section 2113(a) (as charged in Counts 1, 2 and 5 of the indictment), which judgment of conviction was because of entering Savings and Loan Association with intent to commit robbery and taking money belonging to that Savings and Loan Association; of assaulting and putting in jeopardy the life of a person while taking money in the custody and control of the Savings and Loan Association in violation of Title 18, U.S.C., Section 3112(d) (as charged in Counts 3 and 6; and robbery, in violation of Title 22, District of Columbia Code, Section 2901 (as charged in Counts 4 and 7). The Appellant received a sentence of six (6) years to twenty (20) years on each of Counts 1, 2 and 5; five (5) years to fifteen (15) years on each of Counts 3 and 6; and five (5) years to

*/ This case has not previously been before this Court.

fifteen (15) years on each of Counts and 7, these sentences, by the counts, to run concurrently with each other and consecutively with the sentence of four (4) to fourteen (14) years which had previously been imposed in Criminal Case No. 878-61.

The Trial Court entered an order allowing this Appellant to prosecute this appeal in forma pauperis. On December 27, 1968, the original record in the case below (22563) was docketed in this Court, and on December 6, 1968, the undersigned attorney was appointed to represent the Appellant in connection with this appeal.

This Court has jurisdiction of this case by virtue of 28 U.S.C. § 1291 and Rule 41 of the General Rules of this Court.

STATEMENT OF THE CASE

The Appellant in the case below was the only witness on behalf of the defense. After he had testified on direct examination and during the course of cross examination, counsel for the prosecution and Appellant approached the bench (Tr. 65), at which time the prosecution inquired whether the Court would permit the prosecution to use the conviction of a previous bank robbery involving this very bank. The Government witness, a bank teller, Gail Pond, testified that previous to the time Appellant allegedly robbed the bank (August 15, 1966), she had seen him previous times, both in

her office and on the street (Tr. 11). A statement of another bank teller and a Government witness was read into the record, wherein she is alleged to have heard Gail Pond exclaim, "Oh, my God, here he comes." That was contained in the Jencks Exhibit 3, (Tr. 45).

Then, the prosecution, after ruling by the Court, put in evidence that on June 11, 1964, the Appellant was convicted of bank robbery in the District of Columbia. The Court stated at pages 67-69:

> "THE COURT: Then you know he has a prior record. Here is a man convicted of a similar offense. He is positively identified by two witnesses whose testimony in my opinion is very strong on the question of identification. He has elected to take the stand without his attorney or without any suggestion on his part through you as to whether or not I would permit him to be cross examined as a result of his prior record.
>
> "I think it is admissible for two purposes. One, to effect his credibility as a witness to show that his alibi is a phony or fake alibi, if the jury believes the other two witnesses who testified. If he escaped from Lorton, the government has a right to show the circumstances why did he go to Texas, what was he doing in Texas. He had with him a gun which has been identified by the witnesses to the effect that they say the gun was similar. The FBI agent arrested him in Texas because obviously he had a look-out for him or warrant or had knowledge he was an escapee. I think all these circumstances the jury must consider. We are looking for the truth in this case. The jury has a right to know whether or not this alibi is a truthful, honest alibi or whether it is a fake or phony alibi. There isn't any in-between with me. As I have said so many, many times the defendant is entitled to a fair and impartial trial and the government is entitled to a fair and impartial trial. It isn't any one-way street in this court.

"I'll hear government counsel if you want to present this. I'll hear you why you think it is admissible.

"There is a statute, Congress has said in no uncertain terms that a person may be cross examined -- I am not giving the substance of the statute -- but he may be cross examined for the purpose of affecting the credibility of the witness. His credibility is in issue the same as the credibility of Mr. Schott's, the FBI agent, and the two witnesses who were held up and Officer Blancato. Everybody's credibility is in issue who took the stand. I see no reason why under the circumstances of this case, I don't say if a request had been made of this Court prior to the defendant taking the stand -- I didn't even know he was going to take the stand, frankly, until he got on there, until you made your opening statement. I assumed someone was going to testify as his alibi."

The Court further stated (Tr. 70-71):

"THE COURT: But you never asked me what position I'd take is the point. If you said to me: Judge Sirica, if I put this man on the stand are you going to permit the government to impeach him by cross examining him as to prior conviction? That would have given me opportunity at least, or I might have heard it out of presence of the jury. But even if you had asked me that question and put him on anyway I don't think would have made any difference because I think under the factual situation in this case this jury is entitled to know whether this is an honest alibi or not, and his credibility is in issue the same as any other witness's credibility is in issue and I think it is very important the jury have all the facts.

"If the government wants to offer it for the purpose of affecting his credibility I will permit it under the circumstances and facts in this case."

The Court permitted the introduction of the previous conviction, in part, on the ground that the application of the Luck rule was not asked for by counsel for Appellant at an appropriate

*/ Court-appointed counsel.

time (Tr. 72-73). The Court also agreed with the prosecution that in his exercise of discretion he would limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for the disclosure and where the conviction directly relates to veracity" (Tr. 73). The Court was fully aware of the previous conviction of the Appellant of robbery of the same bank as he was charged with here by reason of bench conferences with counsel for the prosecution and the Appellant (Tr. 79-80). The jury itself was fully aware, at least by insinuation, that the Appellant had previously robbed and been convicted of robbery of the same bank in 1964. (Tr. 81)

The Appellant requested the Court in the case below, pursuant to the provisions of Title 24, Section 301 of the District of Columbia Code, as amended, August 9, 1955, for a psychiatric examination to determine whether he was mentally competent to stand trial. On November 17, 1967, the Court found, having heard testimony "from a psychiatrist," that Appellant was mentally competent to stand trial. Previous to the pretrial mental examination, the Court had ordered the Appellant be transferred to St. Elizabeths Hospital for 60 days for examination. Presumably, this examination encompassed queries by individual doctors and finally by staff conferences, in accordance with the procedure as outlined in the Thornton case, cited in the argument. Then, after conviction, Appellant again asked for a presentence mental examination by motion, and

on May 17, the Court ordered that he be sent to St. Elizabeths again for a period of another 60 days "for examination by the psychiatric staff" of that hospital to determine whether he was mentally competent to be sentenced. The record in this case does not indicate the disposition by the Court after Appellant had been examined by the doctors at St. Elizabeths. Nor, does the record indicate what report was made by the doctors at St. Elizabeths. Presumably, however, the report indicated that the Appellant was mentally competent to be sentenced because he was, in fact, sentenced and because he made this appeal.

STATUTES INVOLVED

Title 18 U.S.C. § 2113(a); Title U.S.C. § 2113(d); Title 22, District of Columbia Code, § 2901; Title 24, District of Columbia Code, § 301(b); Title 14, District of Columbia Code, § 305, Supp. V, 1966.

STATEMENT OF POINTS

1. The Court should not have permitted the prosecution to introduce evidence of conviction of a previous identical crime as to that which he was then on trial.

2. The Court should not have refused to permit counsel for Appellant to rely on the Luck rule simply because he decided that its application was requested too late.

3. The Court should have advised the Appellant that he was entitled to have his counsel present at staff conferences of doctors which were held to determine whether he was competent to stand trial and whether he was mentally competent to be sentenced.

4. The case should be remanded to the Court below for the purpose of conducting an additional psychiatric examination at which Appellant might be represented by counsel at any staff conferences held by the doctors.

SUMMARY OF ARGUMENT

There are three main grounds which are urged upon this Court on this appeal for reversal or remand:

1. The Appellant here allegedly committed the crime charged below when he was an escapee from Lorton Reformatory, having been incarcerated there after conviction for bank robbery of the same bank as charged in the trial below. The Court permitted the introduction of evidence by the prosecution of this previous conviction without any heed of the suggestions made by this Court in previous cases that such a conviction of this type should be introduced "sparingly."

2. The Court should not have foreclosed Appellant of his right to the application of the Luck rule even though request was made after Appellant took the stand.

3. In view of the case of Rudolph N. Thornton v. Honorable Howard F. Corcoran, enunciated by this Court on January 3, 1969, the Court below should have at least advised the Appellant that he was entitled to counsel at staff conferences in order to protect his rights against incrimination.

4. In any event, however, since the decision in the Thornton case, it may well be that the Court would believe that this is a proper vehicle for remand to the Court below to again have the Appellant examined at St. Elizabeths under the laboratory conditions as set forth in Thornton with consultation and presence of Appellant's own counsel at these psychiatric staff examinations.

ARGUMENT

I. The Court Should Not Have Permitted the Prosecution to Introduce Evidence of Conviction of a Previous Identical Crime as to that which He Was then on Trial.

The record in this case indicates that the Court permitted the prosecution to introduce into evidence a conviction of a previous identical crime as to that which Appellant was then on trial, to wit, robbery of a bank. Not only was the crime identical, but it was a conviction which arose out of the robbery of this same bank several years previous. The record is devoid of a showing of any inquiry by the Court as to whether there were different types of previous criminal convictions against this Appellant, in order to avoid the introduction of an identical bank robbery conviction. Although

research indicates that there is no rule requiring the Court to make such an inquiry, it seems that from what is said in Gordon v. U.S., 127 U.S. App. D.C. 343, 383 F. 2d 936, caution should be exercised by the trial judge to determine whether there were previous convictions unlike that for which the Appellant was on trial. In this way, the Appellant would be protected and the trial judge could then exercise his discretion and permit the jury to hear Appellant's side of the case. Thereby, the Appellant would not be in the position of foregoing that opportunity because of fear of prejudice founded upon the prior conviction. Luck v. U.S., 121 U.S. App. D.C. 151, 348 F. 2d 763.

As the Court said in Gordon:

> "A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurers to believe that 'if he did it before, he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly: one solution might well be that discretion be exercised to limit the impeachment by way of similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and when the conviction directly relates to veracity." (Emphasis supplied.)

The latter part of the language of the Court in Gordon indicates a strong feeling by the Court that evidence of conviction of an identical crime is highly prejudicial against the Appellant if he takes the stand on his own behalf.

Certainly, it is human nature, even for prudent men, to retain in their minds that the conviction introduced in evidence of a previous crime of bank robbery makes the defendant a professional bank robber. Especially is this so as here, where the Court was aware and the jury knew, at least by insinuation, that the previous robbery for which the Appellant was convicted was of this same bank. Moreover, the Court said in Gordon that extreme caution should be exercised to limit impeachment by way of a similar crime to a single conviction when all of the circumstances indicate strong reasons for disclosure and, where the former conviction directly relates to the question of veracity. From previous cases dealing on this subject by this Court, it would seem to be the holding that a previous conviction of bank robbery might go to the question of credibility and, therefore, is admissible to impeach. The two cogent reasons given by the Court in Gordon are in the conjunctive, the last of which says that the previous conviction must be directly related to veracity. Does this mean that the previous conviction under the circumstances as set forth in Gordon should bear clearly on credibility? As Judge Fahy states in his dissenting opinion in Stevens v. U.S., 125 U.S. App. D.C., 370 F. 2d 483,

> "Perhaps the evidence of a prior criminal record could be limited to a conviction which bears clearly on credibility -- perjury for example."

Although it is recognized that the Court below is not the trier of the facts, the Court did estimate in the record below that the Appellant was "positively identified by two witnesses whose testimony in my opinion is very strong on the question of identification" (Tr. 67). (Emphasis supplied.) Under these circumstances, was there a necessity to permit this type of a previous conviction to be introduced since it may be assumed that the jury would have the same view as that of the Court?*/

Another factor which it is submitted the Court should have considered was whether the Appellant had any supporting witnesses of his testimony with respect to his alibi. As it turned out, Appellant's own testimony with respect to his whole case was all that he had in his defense, since, at the time the Luck rule was requested to be applied by counsel for the Appellant below, some testimony had already been introduced with respect to his alibi, and the Court was fully aware that that was the Appellant's defense.

In Brown v. U.S., 125 U.S. App. D.C. 220, 370 F. 2d 242, the Court found that the fact that defendant on trial for assault has already been convicted of a previous assault had no bearing on credibility. The previous assault, the Court says, may establish a history of violent conduct, but the proof of prior violent behavior is inadmissible to prove assault. The

*/ This statement was made by the Court at a bench conference without the hearing of the jury.

Court said further:

> "One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case whether or not the defendant has a prior record.
>
> * * *
>
> "In fact, when the defendant does take the stand the jury is charged to consider his interest in the outcome of the trial in assessing his credibility."

The language of the Brown case would seem to indicate that a proper decision under the circumstances of the instant case would be that the jury be left without the introduction of the previous bank robbery conviction and let them assess the credibility of the Appellant himself, they being aware of the interest that Appellant would have in the outcome of the case.

It would seem that this would be a typical case to apply the reasoning of the Court in the Luck case and the application of that rule in that this, indeed, was a case where the Court should have exercised his discretion in favor of denying the introduction of a previous identical crime. The prejudicial effect thereof should have far outweighed the probative relevance of the prior conviction. Indeed, had the Appellant not taken the stand in his own defense, it would have amounted in a change of plea from not guilty to guilty because it is conceded here that certainly a prima facie case had been made out by the prosecution for submission to the jury. The extreme prejudice caused to the Appellant by his taking the

stand and risking the introduction of the previous conviction of bank robbery would seem to far outweigh the probative relevance of that conviction. More so, is the fact that it was not only the identical conviction but an identical conviction of bank robbery of the same bank.

The Court has previously pointed out that some crimes relate directly to veracity whereas other crimes relate indirectly to veracity. Bank robbery as to veracity should fall in the latter category.

Using the above criteria, the Court below should have well reached the conclusion that the probative relevance of the prior conviction of bank robbery of the same bank was far outweighed by the prejudicial effect of the introduction of that evidence for the purpose of testing Appellant's veracity.

II. <u>The Court Should Not Have Refused to Permit Counsel for Appellant to Rely on the Luck Rule Simply because the Court Decided that its Application was Requested too Late</u>.

As the record below shows, the Appellant did not raise the application of the Luck rule until after he took the stand and was in the midst of cross examination. Although the Court indicated a feeling that, although the rule was requested to be applied too late, nonetheless, he did seem to feel that he would have permitted the introduction of the previous crime anyway. However, he made the flat decision that, if counsel for Appellant had raised the Luck rule at the appropriate time to deny the introduction of the previous conviction it

would have given him an "opportunity, at least, or I might have heard it out of the presence of the jury." It is apparent that counsel for Appellant must have believed by reason of this ruling that it would be of no avail to ask for the application of the Luck rule and to state her reasons why the previous conviction should not be introduced.

In any event, we submit that the Court should have applied the reasoning of Williams v. U.S., 129 U.S.App.D.C.332 394 F.2d 957 where the admissibility of appellant's prior conviction was not raised until after he had taken the stand and testified. In these circumstances, the Court said:

> "Certainly a trial judge in exercising his discretion under Luck is entitled to take into account whether counsel has made the judgment, and so advised his client that the risk of prejudice is so great as to preclude the defendant's taking the stand in the absence of a ruling excluding evidence of prior convictions."

It is apparent that counsel made the judgment of risk, but the judgment was made too late. There was no inquiry made by the Court below as to whether the counsel had made this judgment previous to the Appellant taking the stand, and simply because she did make a judgment at what the Court considered an inappropriate time should not affect the prejudice that occurred to the Appellant, by reason of the introduction of the previous conviction. Judge Bazelon, concurring in the Williams case, went further than the majority:

> "Indeed, if there is a duty to raise the Luck issue before the Defendant takes the stand, I think we should consider whether that duty does

"not belong equally to the court and the prosecution."

Judge Fahy, in his dissent in Stevens, supra, stated:

> "The failure of trial counsel to rely upon our Luck decision to seek at least some limitation upon this type of evidence should not prevent our finding plain error affecting substantial rights in the failure of the court to apply the Luck decision." 370 F. 2d 483.

III. The Court Should Have Advised the Appellant that He Was Entitled to Have His Counsel Present at Staff Conferences of Doctors which Were Held to Determine Whether He Was Competent to Stand Trial and Whether He Was Mentally Competent to be Sentenced.

The Court should have advised Appellant that he was entitled to have his own counsel present at staff conferences when he was transferred to St. Elizabeths.

Previous to trial, the Court, on August 18, 1967, ordered Appellant committed to St. Elizabeths Hospital for a period not to exceed 60 days in order for the psychiatric staff of the hospital to make a report as to whether the Appellant was presently mentally competent to properly assist in the preparation of his case and to determine whether he suffered from a mental disease. The Court determined on November 17, 1967, that the Appellant was mentally competent to stand trial. The Court made this determination after having received testimony from a psychiatrist attached to the staff. This record is devoid of any written report from the superintendent of the hospital, although the order of the Court on August 18, 1967 did seem to indicate that such a written report was sent to the Court by the superintendent of the hospital.

By order of the Court, the Appellant was again transferred to the hospital for a period not to exceed 60 days on May 17, 1968, to determine whether he was competent to be sentenced. This was done by the Court after having considered a report submitted to him by a staff psychiatrist of the legal psychiatric services in which report it was stated that that doctor was unable to express any opinion concerning the Appellant's competence to be sentenced without hospitalization. That report is not in this record. The record does not indicate the disposition of the Court as to whether Appellant was competent to be sentenced, but it is apparent that the Court so found since he actually was sentenced and has appealed his case. There is an indication made by Appellant in his motion for a pre-sentence mental examination filed February 20, 1968 that he is suffering from a mental disease, "namely a character disorder." This, taken together with the report of the psychiatrist on May 2, 1968 that that doctor was not able to determine his competency for sentencing, indicates at least that the competency of Appellant was questionable.

Under these circumstances, it is submitted that the rule as stated in Thornton v. Corcoran (No. 21,974), decided by this Court on January 3, 1969, should be applied in this case. In Thornton, the majority found in denying the writ of mandamus that the trial judge, when the Appellant came to trial should consider the Appellant's motion to exercise his authority and enter an order that Appellant be represented by his counsel at

staff conferences. In Thornton, the Court said:

> "To the extent that the self-incrimination issue arises when the individual is interviewed by the assembled battery of experts at his staff conference, the argument for a right to counsel during at least that part of the conference becomes more compelling. The standard justification for excluding counsel from the examining room is that because of 'the intimate and personal nature of the examination. . ., the presence of a third party, in a legal and non-medical capacity, would severely impair the efficiency of the examination.' United States v. Albright, 388 F.2d at 726. This reasoning also loses much of its force when a staff conference is involved. A lawyer is undeniably a "third party" to the doctor-patient relationship. As such, physicians may feel he is a fatally disruptive influence. But the staff conference is hardly as private and as individualized an encounter. The individual under examination faces a number of staff members, most of whom he has never seen before. The argument that a lawyer will prove a fatally disruptive influence at such a hearing is not compelling."

The Court then went on to say that the cross examination of Government witnesses to test competency is crucially important to the defense. The argument submitted by the hospital, said the Court, that defense attorneys may adequately cross examine staff members at a hearing before the Court on the basis of reports and files made available to defense counsel is not persuasive, since the hospital "has not displayed an enthusiasm to make such reports available to the defense," citing Washington v. U.S., 129U.S. App. D.C. 29 , 390 F. 2d 444. In making a determination in Thornton, there were considerable reasons suggested for permitting counsel for Appellant to be present at staff conferences. The Court

referred to Wade v. U.S., 388 U.S. 218, where that Court found that the defendant need not stand alone at any stage of the prosecution, either formal or informal, where counsel's absence might affect the right of the accused to a fair trial. Although, in Wade, the Supreme Court found no evidence of testimonial or communicative nature was extracted from the defendant when he appeared at a lineup. this Court, in Thornton, said this argument was not too persuasive as to the statements made by the Appellant in the context of a psychiatric examination "where the words of the accused are critically important in determining his mental condition." In face of this, for all this Court knows, the doctors at the staff conferences, at which Appellant was interviewed, might possibly have directed to him questions about the bank robbery in order to determine his mental condition at the time that he allegedly robbed the bank. Also, they might have had before them a record of previous convictions and other matters that might be critically important in determining his mental condition, but which might have been objected to by counsel if he were present at the staff conference, thereby protecting his rights, be the staff conference considered a formal or informal stage of the prosecution. In these circumstances, it is submitted that Appellant should have had the benefit of counsel at the staff conferences, in accordance with the reasoning in Thornton.

IV. The Case Should Be Remanded to the Court below for the Purpose of Conducting an Additional Psychiatric Examination at which Appellant Might be Represented by Counsel at any Staff Conferences Held by the Doctors.

In the event that the Court finds that the Court below did not err in failing to advise Appellant of his right to have counsel present at the staff conference, it is submitted that, in view of the Thornton decision, at least it might serve the interests of justice to remand this case to the Court below and for an additional examination at which counsel for the Appellant might be present. Indeed, this case might be a proper vehicle for remand to be examined again under the conditions as set forth in Thornton.

It is suggested that consideration be given to this request, particularly by virtue of the fact that the reports of the doctors of St. Elizabeths are not before the Court at this time and at least on remand not only would the Appellant have the benefit of counsel at any further examination but previous reports submitted by St. Elizabeths before and after the trial of this case would be available to the Appellant.

CONCLUSION

Based on the foregoing, Appellant respectfully submits that the judgment below should be reversed and the case remanded for purposes of affording him a new trial.

Respectfully submitted,

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Washington, D. C. 20005
Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief for Appellant on Counsel for the Appellee by delivering a copy thereof to the office of David G. Bress, United States Attorney, United States Courthouse, Washington, D. C.

Thomas X. Dunn

March 19, 1969.